No. 88-1657

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

S.H. and P.F., et al.,

Petitioners,

v.

JOE EDWARDS, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the State of Georgia is required, by the Fourteenth Amendment to the United States Constitution, to create and fund alternative residential settings for mentally retarded persons whose habilitation in state facilities is within the scope of professional judgment and practices, solely because a different residential setting is recommended.

II. Whether this Court should review questions of state law which create in Petitioners no liberty interest under the Fourteenth Amendment to the United States Constitution.

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondents Joe Edwards and R. Derril Gay respectfully request that this Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. That opinion is reported at 860 F.2d 1045 (1988).

ADDITIONAL GEORGIA LAWS INVOLVED

Art. III, Sec. IX, Par. I, Ga. Constitution, 1983:

No money shall be drawn from the treasury except by appropriation made by law.

O.C.G.A. § 37-4-2(10):

'Least restrictive alternative,' 'least restrictive environment,' or 'least restrictive appropriate habilitation' means that which is the least restrictive available alternative, environment, or appropriate habilitation, as applicable, within the limits of state funds specifically appropriated therefor.

O.C.G.A. § 37-4-3(b)(5):

(b) In addition to the other powers provided by this chapter, the department shall have the authority:

* * *

(5) To determine the care, treatment, education, habilitation, or other specialized services being given all clients.

STATEMENT OF THE CASE

The named Petitioners, S.H. and P.F., both of whom are mentally retarded, brought this class action in 1981 against two Georgia public officials who then supervised the State's mental retardation system in their individual and official capacities. (The original Defendants have been replaced by James G. Ledbetter and John Gates, in their official capacities only). Petitioners alleged that they had been deprived of administrative hearings in violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment and State law, and that they were entitled to habilitation in the least restrictive alternative

as a substantive right under the Due Process Clause, and under § 504 of the Rehabilitation Act of 1975, 29 U.S.C. § 794, and state law. They sought damages, declaratory and injunctive relief, and attorneys fees.

Petitioners moved for partial summary judgment in favor of their claim for administrative hearings and their state law claim for habilitation in the least restrictive alternative; Respondents moved for summary judgment on all issues. The District Court granted Petitioners the administrative hearings they sought on constitutional grounds, and granted Respondents' motion for summary judgment on Petitioners' claim for habilitation in community residential placements, based upon state law, substantive due process and § 504. Petitioners appealed the trial court's decision that they were not entitled to habilitation in community residential placements under the Due Process Clause and § 504. The Eleventh Circuit upheld the District Court's decision and Petitioners are seeking a writ of certiorari from this Court, alleging a substantive right to community residential placements under the Due Process Clause.

The evidence below showed that Georgia voluntarily began a community residential services program for the mentally retarded in 1972, receiving the first large appropriations in 1978 and 1979. By 1983, 1,312 persons were housed in community residential placements, while approximately 2,300 persons were habilitated in institutions. Exhs. B and C to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment. In fiscal year 1983, the state spent $29 million for community residential and nonresidential support services. During 1978 and 1979, state officials overestimated their ability to expand

the community services program within a one-year period, resulting in an unusual lapse of funds; however, since that time only small, and not unexpected, lapses have occurred. Exhs. B and D to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment.

Contrary to the claim of Petitioners, the District Court did not find that members of the class were "in immediate need" of community residential placements. That court's only finding in this regard was that a 1980 state-supported survey concluded some persons in institutions would be "more appropriately served in community residential placements." App. 13a-16a. Respondents filed affidavits fully supporting their position that habilitation of the members of the class in state institutions did not fall below constitutional standards.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFFS WERE NOT ENTITLED, UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, TO ALTERNATIVE RESIDENTIAL PLACEMENTS BECAUSE THE HABILITATION THEY WERE RECEIVING IN STATE FACILITIES FELL WITHIN THE SCOPE OF PROFESSIONAL JUDGMENT OR PRACTICE.

As Petitioners conceded in oral argument before the Eleventh Circuit Court of Appeals, they do not seek literal "discharge" from state care and supervision in this litigation. Instead, they ask this Court and the federal

courts below to order the State of Georgia to create and fund new alternative "community residential placements" for them. This movement from a state institution to a "community" placement is not a discharge from state supervision, but a "transfer"[1] to another state supported and supervised residence, much as was characterized by this Court as merely the closing of a "major state instititution" and the creation and expansive funding of "smaller state institutions." *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 107 (1984). (*Pennhurst II*).

In this litigation, Petitioners assert that they have, under the Due Process Clause of the Fourteenth Amendment, a substantive right to, and a liberty interest in, habilitation in smaller community placements.[2] In granting Respondents' Motion for Summary Judgment, the Eleventh Circuit correctly applied the standard established by this Court in *Youngberg v. Romeo,* 457 U.S. 307 (1982) to test whether these alleged rights have been violated.

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[1] Of the 1,312 persons in state funded community residential placements in 1983, 83% required 24-hour care and supervision. It was estimated that persons subsequently moved to such placements would require a greater intensity of services than those placed prior to 1983. Exhs. B and C to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment.

[2] Respondents have consistently argued that Petitioners' claim of an entitlement to community placements does not rise to a constitutional right. If the Petition for Certiorari is granted, Respondents will present this argument more fully in their brief on the merits.

Federal courts have traditionally applied a loose balancing test to evaluate such claims. However, in *Youngberg*, this Court established a more precise test, expressing an intention for uniformity. This Court concluded that deference should be given to "the judgment exercised by qualified professionals" when evaluating the treatment received by an institutionalized mentally retarded person. *Youngberg v. Romeo, supra* at 321-322. No doubt to insure that the habilitation provided did not fall below the level of minimal adequacy and to provide some assurance to treatment personnel, the Court held that liability could be imposed only when "the [treatment] decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment, practice or standards." *Id.* at 323. The State is not required to provide optimal or better treatment, but only habilitation which falls within the scope of accepted professional judgment. *Id. See Bell v. Wolfish*, 841 U.S. 520 (1979).

The Eleventh Circuit applied this test from *Youngberg* when it said "[w]e agree with the Circuits which interpret *Youngberg* as requiring states to provide habilitation in accord with prevailing standards of practice" and in concluding that the habilitation provided to Petitioners in Georgia's institutions while awaiting community placements if appropriate, "does not deviate from professionally accepted standards." *S.H. v. Edwards*, 860 F.2d 1045, 1046 (11th Cir. 1988) (App. 3a). Like conclusions have been drawn by other circuit courts in similar cases. *See Lelsz v. Kavanaugh*, 807 F.2d 1243 (5th Cir. 1987); *Doe v.*

Gaughan, 808 F.2d 871 (1st Cir. 1986) (mentally ill plaintiff); *Society for Good Will To Retarded Children v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983).

It is not true, as Petitioners suggest, that the Eleventh Circuit decision was limited to an academic or generalized consideration of the propriety of habilitation of the class in institutions. Respondents presented evidence that professional judgment was exercised in the habilitation of the class by the establishment, review and up-dating of treatment plans. *See* Exh. A to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment. They also submitted affidavits[3] in which experts, who were familiar with the State institutions housing members of the Class, testified that: (1) they were, based on personal experience, familiar with the treatment received by the resident at a specific institution, and (2) based upon their

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[3] Petitioners complained that these affidavits were served after the motions for summary judgment were filed, claiming prejudice because discovery was over at that point. Actually, as the record will show, the motions for summary judgment themselves were filed after discovery had been completed; Petitioners were not prejudiced by the delay between the filing of the summary judgment motions and the affidavits Respondents rely on. Further, these affidavits were accepted by the trial court magistrate only after Petitioners had asked permission to present additional evidence and Respondents agreed, if afforded the same opportunity. The magistrate gave each party time to submit additional evidence and to respond. Petitioners complained when the affidavits were submitted, but did not submit conflicting evidence or move for the re-opening of discovery.

personal knowledge, the habilitation provided to the persons residing at those institutions fell within the scope of professionally acceptable judgment. Exhs. B-E to Defendants' Supplemental Brief. Thus, Respondents proved by sworn testimony that the habilitation of the members of the plaintiff class in State facilities met constitutional standards.

Petitioners raised no material question of fact with regard to this pivotal issue. They cited a pamphlet prepared by an unnamed employee of the State Department of Human Resources defending the State community residential services program and claiming that institutional care of the mentally retarded interfered with their normalization. Pet. 18-19, 48-49. Petitioners also showed evidence that a 1981 study completed by the State Department of Human Resources found that certain residents of state institutions could be "more appropriately" served in "alternative residential facilities," and that institutional personnel had recommended institutional residents for participation in the already established State community residential services program. App. 13a-16a, Exh. 18 to Plaintiff's Motion for Partial Summary Judgment. (However, as Respondents showed, these recommendations did *not* indicate that those persons no longer met criteria for institutional commitment under O.C.G.A. § 37-4-40. Exh. A to Defendants' Supplemental Brief.) Finally, medical records concerning Petitioner S.H. indicated that personnel at the institution where she resided[4]

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[4] All parties agreed before the Circuit Court that S.H. was moved to a community placement prior to the filing of the affidavits.

felt that her needs had not been met by the institution and that she had regressed; however, the records also indicate that this condition was a result of S.H.'s failure to cooperate in the program provided. Exhs. 6-11 to Plaintiffs' Motion for Partial Summary Judgment.) There was not one shred of evidence that the habilitation provided to the members of the Petitioners class in State institutions fell below minimum professional standards, but only that some Petitioners could be *better* served in community residential alternatives. There was no evidence, as indicated by a lack of citations in the Petition, to support Petitioners' claim that State institutions failed to meet the needs of hundreds of the plaintiff class, were injurious to them, or that, absent the community residential placements to which they claim an entitlement, class members did not need to be cared for in the institutions where they resided. *See* Pet. 21, 47, 49. The trial court *did not* find, as Petitioners repeatedly argue, that any members of the class were in "immediate need" of community placements. App. 13a-16a.

Respondents disproved a material element of Petitioners' cause of action that the habilitation provided to class members fell below minimally accepted standards. There is no relevant evidence raising a material issue of fact concerning this element. As this Court said in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1985) " . . . there is no issue for trial until there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for the party. . . . If the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted." Accordingly, without a genuine issue of fact remaining as to this issue, under Rule 56,

Defendants were entitled to summary judgment. Fed. R. Civ. P. 56(e). *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A party may not oppose a motion for summary judgment with evidence hoped to be discovered at trial. *Micro-Sparc, Inc. v. Weinstock*, 758 F.2d. 790 (1st Cir. 1988).

Moreover, the affidavits submitted by Defendants were not irrelevant, but spoke directly to the state action subject to scrutiny under the *Youngberg* test – the habilitation provided to Petitioners. In arguing that the affidavits are irrelevant, Petitioners have listed numerous "decisions" allegedly made concerning Petitioners, revolving around the recommendation that some class members be housed in community residential placements, and have suggested that the Court give deference to one or more of those decisions. Pet. 35-39. This argument distorts the *Youngberg* test. Under *Youngberg*, deference is given to decisions of the State officials actually delivering the habilitation in question; liability is established *only* where that habilitation falls below professionally accepted judgment or standards.

Petitioners appear to argue that members of their class are constitutionally entitled to community residential placements because treatment personnel have recommended or suggest such placements. This argument again reflects a misunderstanding of this Court's decision in *Youngberg*. Petitioners fail to recognize that state officials are required to meet, at most, only *minimal* constitutional standards. *See Youngberg v. Romeo, supra* at 322; *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Youngberg*, the constitutional acceptability of the mentally retarded plaintiffs' care was judged, not by recommendations for a *better* course of habilitation, but by whether the treatment Mr.

Romeo actually received fell within the scope of professional standards. *Id.* at 321-324. *See Lelsz v. Kavanaugh, supra* at 1251; *Society for Good Will to Retarded Citizens v. Cuomo, supra* at 1249. As the Second Circuit Court of Appeals said in *Society For Good Will To Retarded Citizens v. Cuomo, supra* at 1249, even if every expert presented testified that community residential placements were "better" for the mentally retarded, "the federal courts may only decide whether the treatment or residence setting actually selected was a 'substantial departure' from prevailing standards."

If the Petitioners' interpretations were correct, the constitutional rights of mentally retarded persons would vary from state to state and institution to institution, based upon the favored school of professional thought. The uniform constitutional standards sought by this Court in *Youngberg* would not exist and states would be required to provide whatever treatment professionals recommended.

Finally, the decision of the Eleventh Circuit in this case does not, as the Plaintiffs argue, eviscerate this Court's decisions in *Parham v. J.R.*, 442 U.S. 584 (1979) and *Jackson v. Indiana*, 406 U.S. 715 (1972). To the contrary, the Eleventh Circuit's deference to the opinions of experts concerning the acceptability of the habilitation of Petitioners in state institutions is entirely consistent with this Court's opinion in *Parham*, which itself gave deference to the "independent medical judgment" of state hospital professionals in the admission of mentally ill children to state facilities.[5] Contrary to Petitioners' representation

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[5] *Parham* does not require the Defendants to submit detailed affidavits concerning the habilitation of each of the 1000+ Petitioners in order for summary judgment to be granted.

throughout the Petition, the Eleventh Circuit decision was based on uncontroverted evidence concerning the habilitation provided to the plaintiff class that "Georgia's decision to keep *these plaintiffs* in institutional settings . . . does not deviate from professionally accepted standards." (App. 3a.) *See* Pet. 34-35 and 40-41. This conclusion does not eviscerate *Parham*.

Nor does the Eleventh Circuit's decision "fly in the face" of *Jackson*, where this Court held that an individual may not be indefinitely confined to a mental institution because he is incompetent to stand trial on a criminal charge. In explaining its decision, this Court stated that due process required that "the nature and duration of commitment must bear some reasonable relation to the purpose for which an individual is committed." *Jackson v. Indiana, supra* at 728. Because Petitioners herein do not claim that they are capable of caring for themselves or providing such care through others, but seek instead alternative residential care and supervision from the State, the State's continuing reason for providing for their custodial care and habilitation is clear. *See Donaldson v. O'Connor*, 422 U.S. 563, 576 (1975). Petitioners likewise do not contend that, absent available community placements, they do not meet state criteria for commitment to the facilities in which they currently reside. *See* O.C.G.A. § 37-4-40. Thus, the application of *Jackson* to this case is questionable, for it certainly does not establish a right to change one's place of habilitation. Consequently, this compliance with *Youngberg, Parham, Jackson* and other controlling decisions of this Court militates against the issuance of a writ of certiorari to review the Eleventh Circuit's decision.

II. THIS COURT SHOULD NOT REVIEW QUESTIONS OF STATE LAW WHICH CREATE IN PETITIONERS NO LIBERTY INTEREST UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners also argue that the District Court and the Court of Appeals erred by rejecting their claim that Georgia substantive law mandates their deinstitutionalization, and that the "failure of the State to abide by that mandate is redressable under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Pet. 59.

In making this assertion, Petitioners rely primarily upon those portions of the Habilitation of the Mentally Retarded Act, O.C.G.A. §§ 37-4-1 through §§ 37-4-127 (Habilitation Act) and the Community Services for the Mentally Retarded Act, O.C.G.A. § 37-5-1 through 37-5-10 (Community Services Act) set out in their Petition at 5-8. An examination of those code sections clearly demonstrates, however, that they do not even come close to creating a liberty interest in community placements for the mentally retarded. In the first place, the Habilitation Act is self-limiting in a fashion Petitioners have neglected to mention: the "least restrictive placement" and "least restrictive appropriate habilitation" to which Petitioners claim they are entitled by virtue of O.C.G.A. §§ 37-4-121 and 122(a), Pet. 55, means no more than that "which is the least restrictive *available . . . within the limits of the state funds specifically appropriated therefor.*" O.C.G.A. § 37-4-2(10). (emphasis supplied). Secondly, under O.C.G.A. § 37-4-3(b)(5), Respondents' state agency is

given discretion "to determine the care, treatment, education, habilitation, or other specialized services being given to all clients."

Similar restrictions apply to the Community Services Act. As a matter of Georgia law, provision of these services is limited by the appropriations enacted by the Georgia General Assembly. Art. III, Sec. IX, Par. I, Ga. Const. 1983. This Court has recognized that the failure of state legislatures to fully fund legislation benefitting the mentally retarded is merely "a case of the State itself not fulfilling its legislative promises" – not a matter for the federal courts to remedy. *Pennhurst II, supra* at 108. Again, Respondents' department has discretion to decide which community services are to be provided, and in what quantity. O.C.G.A. § 37-5-3-(1). The broad discretion vested in Respondents has been recognized by the Georgia appellate courts. *Robbins v. Lumpkin*, 187 Ga. App. 489, 370 S.E.2d 635 (1988) (reversing a superior court judgment ordering Respondents' department to provide and fund alternative community placement for mentally retarded persons).

Moreover, the State statutes in question neither set "substantive limitations on official discretion," *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983), nor spell out "objective and defined criteria," *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981), for state decisionmakers who must place retarded residents in scarce community resources. Indeed, Petitioners have not, and cannot, point to any "procedural guidelines" or other regulations which "channel the decision-making" regarding the creation of, and access to, community placements.

Hewitt v. Helms, 459 U.S. 460, 471 (1983). As this Court has said, "[i]f the decision-maker is 'not required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' . . . the State has not created a constitutionally protected liberty interest." *Olim v. Wakinekona, supra, quoting Connecticut Board of Pardons v. Dumschat, supra*, at 466-467 (Brennan, J., concurring); *see also Vitek v. Jones*, 445 U.S. 480, 488-491 (1980).

In arguing that the Eleventh Circuit misinterpreted Georgia's laws on the habilitation of its mentally retarded citizens, Petitioners forget that this Court "d[oes] not grant certiorari to decide whether the Court of Appeals correctly applied [state] law." *Butner v. United States*, 440 U.S. 48, 51 (1979); *see also Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967). Instead, this Court generally "accord[s] great deference to the interpretation and application of state law by the court of appeals," *Pembauer v. City of Cincinnati*, 475 U.S. 469, 485 n. 13 (1986), because "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985); *see also Chadron v. Fumero Soto*, 462 U.S. 650, 654 n.5 (1983); *Bishop v. Wood*, 426 U.S. 341, 346, n. 10 (1976).

By their present argument, Petitioners seek to have the federal courts award substantive relief based on particular State laws apparently sought to be incorporated

directly into the Due Process Clause. Petitioners have cited as authority for this novel proposition only federal cases providing procedural protections for rights created by State law. *See, e.g., Mills v. Rogers,* 457 U.S. 291 (1982). In doing so, they have confused the procedural aspect of the Due Process Clause with its substantive aspect. *See Daniels v. Williams,* 474 U.S. 327, 337 (1986) (Stevens, J., concurring); *see also New Motor Vehicle Bd. of California v. Orrin W. Fox Co.,* 439 U.S. 96 (1978); 2 R. Rotunda, J. Nowak, J. Young, *Treatise on Constitutional Law* (1986) at 15, 205 n.14. It bears emphasis again that Petitioners conceded in oral argument before the Eleventh Circuit Court of Appeals that they do not seek literal "discharge" from state care and supervision in this litigation. Consequently, their discussion of, and citations to, procedural due process cases, especially those pertaining to release from state prisons and other facilities, Pet. 59-63, are simply inapposite.

Petitioners' argument that the Georgia statutes in question create rights which are *ipso facto* enforceable through the Fourteenth Amendment fails for at least two reasons. First, the Due Process Clause is designed to serve "as a limitation on the State's power to act. . . ." *DeShaney v. Winnebago County Dept. of Social Services,* ___ U.S.___, ___, 109 S.Ct. 998, 1003 (1989); *see also Daniels, supra,* 474 U.S. at 331. By definition, the Clause cannot serve as a check on a state law if it automatically takes on the shape of that law.

Second, incorporating a particular state law into the Clause would mean that the federal courts in actuality

would be adjudicating a claim that state officials have violated state law. This practice is exactly the one proscribed in *Pennhurst II, supra* at 109, on the ground that a "federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *See also Papasan v. Allain*, 478 U.S. 265 (1986). As noted previously, the District Court granted Respondents relief from Petitioners' express state law claim on the authority of *Pennhurst II*, and the Circuit Court correctly did not disturb that ruling. Petitioners may not evade the force of *Pennhurst II* by attempting to dress their substantive state law claim in constitutional garb. The Court of Appeals and the District Court obviously considered Petitioners' bootstrap argument to be without merit. Since the lower courts were neither "clearly erroneous", *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960), nor "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-487 (1949), their views should be accorded deference by this Court.

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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